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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 150 A/W INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, Respondent, and LIPPERT COMPONENTS, Charging Party.	No. 25-CC-228342 **AMICUS BRIEF OF NORTHERN CALIFORNIA CARPENTERS REGIONAL COUNCIL**

I. INTEREST OF NORTHERN CALIFORNIA CARPENTERS AMICI CURIE

The Northern California Carpenters Regional Council ("Northern California Carpenters") is an intermediate labor organization affiliated with the United Brotherhood of Carpenters and Joiners of America. The Northern California Carpenters and its 23 Local Unions represent approximately 40,000 carpenters in construction, factory built housing, and construction related manufacturing industries. The Northern California Carpenters' jurisdiction within the United Brotherhood of Carpenters is California's 46 northern counties from Monterey County on the Coast and Tulare County in the Southern San Joaquin Valley all the way north to the Oregon border and east to the Nevada state line. Its jurisdiction includes the San Francisco Bay Area, the San Joaquin Valley, the Sacramento Valley, the Northern Coast and most of the Sierra Nevada Mountains.

The Northern California Carpenters use various lawful means to resolve disputes, improve the industry and organize Carpenters. These include publicizing labor disputes, organizing its own members, partnering with signatory employers, and developing working relationships with other participants in the construction and construction-related manufacturing industries. The continued broad definition of ". . . threaten, coerce or restrain . . ." in section 8(b)(4)(i and ii), 29 U.S.C. § 168 (b)(4)(i and ii) of the Act to include interference and the even broader definition the General Counsel seeks bars otherwise legal speech-related activities and requires the Northern California Carpenters to use its resources against the interests of its own members.

In this case, the Board has asked whether it should overrule current Board law that holds the display of stationary banners and rat balloons does not meet elements of Section 8(b)(4)(i) or ii). In its invitation to file briefs, the Board majority seeks to expand the terms ". . . threaten, coerce or restrain . . ." by asking for an analysis of what constitutes picketing. The Board majority asks four questions. The first two inquire of overturning current Board law and defining what conduct constitutes picketing. Questions three and four invite a more ambitious inquiry:

3. If you believe the Board should alter its standard for determining what non-picketing conducting is otherwise unlawfully coercive, under 8(b)(4), what should the standard be?

4. Why would finding the conduct at issue in this case violated the National Labor Relations Act under any proposed standard not result in a violation of the Respondent's rights under the First Amendment?

In this Amicus Brief, the Northern California Carpenters leave the definition of what is or is not picketing and whether Section 8(b)(4) is unconstitutional to Respondent and the other Union Amici. Rather, this Brief argues the statutory language of 8(b)(4)(ii), the Congressional Record and the Constitution of the Unites States do not support the Board's ambition to prohibit all secondary activity. The Act certainly does not support the expansion of the term coercion that the General Counsel advocates. This Brief argues " . . . threaten, coerce or restrain . . . " does not include the peaceful protest here and prohibits physical violence, blocking ingress and egress, or other physical manifestations of threats of force. Section 8(b)(4) of the Act also regulates strikes and picketing. This Brief leaves the definition of those terms to the parties, other Union Amici and to future cases. The facts of future labor disputes will provide opportunity for future Boards to determine the parameters of what is violent and what is not, so this Brief refrains from hypothetical fact patterns. The current Board should simply abandon its current ambition to prohibit all secondary activity under 8(b)(4)(ii) and announce a far narrower standard that bars only a narrow definition of physical picketing and violence or threats of violence.

II. ARGUMENT

This Brief argues that the statutory language and Congressional Record rejects the overbroad statutory interpretation that the General Counsel seeks. First, this Brief argues that the Congressional Record does not prohibit use of persuasion or economic power to achieve a secondary object such as the facts presented here. Congress primarily intended to bar physical violence, blocking ingress and egress, strikes and other physical manifestations of threats of force to carry out a prohibited secondary object. Second, this Brief looks at examples of several cases in which the Board or courts stretched the definition of coercion beyond the intent

articulated in the statutory language and Congressional Record. Third, this Brief concludes by arguing that the Board should adopt a new standard that fairly reflects Congressional intent.

A. SECTION 8(B)(4) PERMITS BANNERING AND OTHER NON-VIOLENT, NON PICKETING ACTIVITY.

This section presents three arguments in favor of a clear standard that "threaten, coerce or restrain" excludes peaceful protest and economic persuasion such as the bannering here. First, the statutory language defining coercion is vague and the Board must find clear Congressional intent to prohibit an action to find a violation of 8(b)(4). Second, the Congressional Record and resulting statutory language bars striking, picketing, blocking entrances or other threat of force. Third, the behavior of the respondent does not meet the 8(b)(4)(ii) threaten, coerce or restrain requirement of violence, picketing, blocking ingress and egress, or other physical manifestation of threats of violence.

1. <u>The Statutory language defining coercion is vague and the Board must find clear congressional intent to prohibit a practice to find a violation of 8(b)(4).</u>

The "threaten, coerce, or restrain" portion of § 8(b)(4)(ii) is notoriously "vague." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 578 (1988); *Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1212 (9th Cir. 2005); *N.L.R.B.. v. Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274, 290 (1960); This vagueness requires the Board to apply caution when interpreting these provisions. The Board should find an unfair labor practice only when the statutory provisions and their Congressional history evidence a "clear intent" to prohibit the practice at issue. *BE&K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 535-36 (2002) ("[I]n *DeBartolo,* we found that the statutory provisions and their Congressional history indicated no clear intent to reach the handballing in question, [citations], and so we simply read the statute not to cover it, thereby avoiding the First Amendment question altogether"). Further, "[t]he only activity that appears to be clearly proscribed by the statute is '*ambulatory* picketing' of secondary businesses." *Overstreet*, 409 at 1212 (quoting *DeBartolo*, at 485 at 587) (emphasis in original). The NLRA does not contain a "sweeping prohibition' of secondary activity. It regulates conduct when a Union has a secondary objective. *Burlington Northern Railroad. Co. v. Brotherhood of*

Maintenance of Way Employees. 481 US 429, 449 (1987). This creates a situation in which the Board must examine the statutory text and the Congressional history to determine if there is the "requisite clarity" to prohibit the conduct at issue. *N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 63 (1964) ("*Tree Fruits*") ("We have examined the legislative history of the amendments to section 8(b)(4), and conclude that it does not reflect with the *requisite clarity* a congressional plan to proscribe all peaceful consumer picketing at secondary sites....") (emphasis added).

The statutory language says nothing about signals, inflatable animals, banners, or symbolic expression. The text of 8(b)(4)(i) and ii) explicitly prohibits, strikes, refusal to handle goods, refusal to work (i) or to " . . . threaten, coerce, or restrain . . ." (ii). This language does not express a clear Congressional intent to bar any kind of communication or other speech or action outside of violence, striking or picketing.

2. <u>The Congressional Record Focuses on Violence and Physical Threats</u>

The Congressional Record of the Taft-Hartley Act as amended by the Landrum-Griffin Act focuses on a showing of a physical manifestation of a threat of force to establish coercion. Much has been written about the Taft-Hartley Act and this Amicus Brief will spare the reader from a list of law review articles. However as is shown by the references to the congressional record below, the advocates of the Act used allegations of violence in labor disputes as the rationale for limiting Union secondary activity. Although the proponents desperately wanted to prohibit all Union secondary activity, they simply failed in that goal. That left them to settle on a much narrower list of prohibitions in Section 8(b)(4)(i) and ii) than the broad prohibition on Union "interference" with a secondary object that they originally sought.

a. Taft-Hartley Act of 1947.

The Taft-Hartley Act as it existed between 1947 and 1959 contained three provisions that are relevant to the instant case. It adopted section 8(b)(1) which provides in relevant part:

> (b) It shall be an unfair labor practice for a labor organization or its agents -
>
> > (1) to restrain or coerce . . . (b) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

Congress also adopted section 8(b)(4).

> (b) It shall be an unfair labor practice for a labor organization or its agents -
>
> > (4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities to perform any services, wherein an object therefore is:
> >
> > (B) Forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9... H.R.Conf.Rept. No 80-510 at 4 (1947) *Reprinted in* 1, NLRB, A Congressional History of the Labor-Management Relations Act, 1947 at 508 (1948).

The Taft-Hartley Act also included section 303 providing a private cause of action for violating section 8(b)(4). The Taft-Hartley version of section 303 provides in relevant part:

> Sec. 303(a)
>
> > It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is -
> > . . .
> > Forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act. Legislative History of LMRA, *Id.* at 529.

The Congressional history of 8(b)(4) focuses largely on violence, mass picketing and other forms of intimidation. As is shown below, the House and Senate Conference Committee removed some (but not all) of the draconian provisions of the original House version of the Taft-Hartley Act. In the House Report, the newly elected Republican Congress focuses on violence, mass picketing and physical intimidation. The concepts in section 12 of the House version eventually became section 8(b) of the final version of the Act. In its discussion of sections 3 and 12, the House Report declares as follows.

> "This section forbids force, violence, physical obstruction or threats thereof in labor disputes, and forbids picketing in numbers or ways other than those reasonably necessary to give notice of the existence of a labor dispute at the place being picketed. The clause preserves the right of free speech but forbids exercising by engaging in mass picketing and by intimidation." HR Report No. 80-245, reprinted in 1 NLRB, A Legislative History of the Labor Management Relations Act, 1947 at 335 (1948)

In its discussion of Section 12(a)(3) which became part of 8(b)(4), the report provides:

> "In discussing the definitions of sympathy strikes, jurisdictional strikes, monopolistic strikes, illegal boycotts, sit down strikes, and feather bedding, the Committee has referred to conditions that have made it necessary to outlaw these practices and to provide means for preventing them and for providing remedies for them when they occur.
>
> Strikes and other concerted activities in lieu of peaceful procedures for settling disputes that the National Labor Relations Act provides are unjustifiable on any grounds." Legislative History of LMRA *Id.* at 335.

The original House language of Section 12(a)(1) bears this intent out. It provides:

> "By the use of force or violence or threats thereof, preventing or attempting to prevent any individual from quitting or continuing in the employment of, or from accepting or refusing employment by any employer, or by the use of force, violence, physical obstruction, or threats thereof, preventing or attempting to prevent any individual from freely going from any place and entering upon an employer's premises, or from freely leaving an employer's premises and going to any other place; or picketing an employer's place of business in number or in a manner otherwise than is reasonably required to give notice of the existence of a labor dispute at such place of business; or picketing or besetting the home of any individual in connection with any labor dispute." Legislative History of LMRA *Id.* at 352.

Section 3(c) of the House version bars in relevant part:

> a. Any strike or other considered interference with an employer's operations, an object of which is i) to compel an employer to recognize for collective bargaining a representative not certified under section 9 as the representative of the employees ..." Legislative History of LMRA *Id.* at 353.

The House must have been concerned that the Board or courts would interpret the term "other concerted interference" in a manner that barred otherwise legal or protected activity, such as requiring persons to work against their will. Subsection (e) provides:

> "Except as specifically provided in this section, nothing in this Act shall be construed to diminish the right of employees to strike or engage in other lawful concerted activities. No provision of this

> Act, and no order of any court issues hereunder, shall be construed to require any individual to perform labor or service without his consent." Legislative History of LMRA *Id.* at 353.

In discussion of the bill that was reported out of the Joint House Senate Conference Committee and ultimately became the Taft-Harley Act, Congressman Hartley emphasized that the primary focus of what became section 8(b)(4) is the prohibition of secondary picketing.

> "This bill also outlines the picketing of a place of business where the proprietor is not involved in the dispute with his employees. Mr. Chairman, why is that provision in order? Our Committee has received and taken evidence all over the United States showing that in attempts to organize, yes, even a small grocery store, or perhaps every member employed in that grocery store were members of the same family, or in cases where only one or two employees were employed, picket lines were placed in front of the establishment, even though there was no wage dispute involved at all." Legislative History of LMRA at 613.

However, the final bill did not contain the broad prohibition in Section 12(a)(1) of the House bill. The final bill contained Section 8(b)(1), reproduced above, in which a Union could not "restrain or coerce". It does not bar any behavior other than work stoppages, mas picketing, or violence.

The Board itself contemporaneously confirmed that the intent of Congress in its use of the terms restraint and coercion was primarily to prohibit Union violence and physical restraint in organizing campaigns. *National Maritime Union,* 78 NLRB No. 137 (1948) is quoted at length here because it is instructive of the historical context and therefore should be persuasive as to the intent of Congress:

> The Act contains no definition of what constitutes "restraint" or "coercion," but during the course of the debate the principal sponsors of the amendment gave examples of the types of conduct that the amendment was intended to reach. The following colloquy between Senators Saltonstall and Taft is particularly illuminating:
>
> > Mr. SALTONSTALL.... I would appreciate very much, in order to make the matter clear in my own mind, if the Senator from Ohio [Taft] would give an example of a restraint he would consider an unfair labor practice, an action which would not be a restraint, an action which would be coercion, and an action which would not be coercion, within the meaning of the words of the bill and the amendment.
> >
> > Mr. TAFT. Answering the Senator from Massachusetts, I would say, in the first place, that I understand the present section against employers has

been used by the Board to prevent employers from making threats to employees to prevent them or dissuade them from joining a labor union. They may be threats to fire the man, of course in the extreme case. They may be threats to reduce his wages, they may be threats to visit some kind of punishment on him within the plant if he undertakes to join a union. Those are the usual types of coercion which have been held to be a violation of the section on the part of the employers. In the case of employers, there have also been some cases of threats of violence, ...

In the case of unions, in the first place, there might be a threat that if a man did not join, the union would raise the initiation fee to $300, and he would have to pay $300 to get in; or there might be a threat that if he did not join, the union would get a closed-shop agreement and keep him from working at all. Then, there might be a threat of beating up his family or himself if he did not join and sign a card. I think when we get to the case of unions, there might be the actually violent act of forcibly, by mass picketing, preventing a man from working.

Let us take the case of mass picketing, which absolutely prevents all the office force from going into the office of a plant. That would be restraint and coercion against those employees, and interference with their right to work....

The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, "Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn." The Board may say, "You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work." As I see it, that is the effect of the amendment. [Emphasis supplied.] (*Cong. Rec.*, May 2, 1947, p. 4561-4562.)

. . . Senator Ball expressed the same thought as to the purpose of the amendment in a radio broadcast which he delivered during the pendency of the Taft-Hartley bill before Congress: "... the only purpose [of Section 8 (b) (1) (A)] is to protect the rights of employees, *to free them from the coercion of goon squads and other strong-arm organizing techniques which a few unions use today.*" [Emphasis supplied.]

In answer to Senator Morse's observation that the amendment would outlaw all strikes to further organization activities, Senator Taft stated:

... I can see nothing in the pending measure which, as suggested by the Senator from Oregon [Morse], would in some way outlaw strikes. *It would outlaw threats against employees. It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing or employing persuasion. All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work.* [Emphasis supplied.] (*Cong. Rec.*, May 2, 1947, p. 4563.)

> This legislative history strongly suggests that Congress was interested in eliminating physical violence and intimidation by unions or their representatives, as well as the use by unions of threats of economic action against specific individuals in an effort to compel them to join.

National Maritime Union, 78 NLRB supra, 984-987 (emphasis in original). The Board in 1948 focused closely on the discussion in Congress to define the otherwise undefined terms restraint and coercion. The Board concluded that Congress was primarily interested in banning violence. There is no reason the current Board should ignore the original intent of the Act in the instant case.

The final word was provided by Senator Taft in his speech that immediately preceded the Senate's vote to override President Truman's veto of the Taft-Hartley Act. Senator Taft is doing a victory lap claiming that the bill barred strikes carried out by "force and violence" and "mass picketing." His statement provides in relevant part:

> "Regardless of the issues in the election, there was unquestionable a demand at that time, as there is now, for labor legislation, for reform of the abuses which had become apparent to the American people. They had become deluged with a series of strikes. . . . [w]ith strikes ordered for men who is not desire the strikes. . . . [w]ith strikes against companies which had settled all differences with their own men. . . . [w]ith strikes in violation of existing collective bargaining agreements. They [the public] knew of mass picketing. They knew that in those strikes, men had been excluded from their own plants by force and violence." Congressional Record, Senate June 23, 1947, reprinted in Legislative History of LMRA at 1652.

The legislative history of the Taft-Hartley Act overwhelmingly provides that it was intended to prevent secondary strikes and secondary violence. The Congressional history simply does not bar the peaceful display of banners, props or inflatable animals, or any other Union use of persuasion or economic power regardless of the object.

b. Landrum-Griffin Act of 1959.

The Congressional debate surrounding the Landrum-Griffin Act § 704(a), 73 Stat. 542-543, 29 U.S.C. (Supp. IV, 1963) § 158(b)(4), "were designed to close certain loopholes in the application of s 8(b)(4)(A) which had been exposed in Board and court decisions." Congress focused almost exclusively on striking secondary employers and encouraging employees of a

secondary employer to cease working. See *DeBartolo*, 485 U.S. at 584; *Fruit & Vegetable Packers & Warehousemen, Local 760,* 58, at 63-68; *N.L.R.B. v. Servette, Inc.*, 377 U.S. 46, 51-54 (1964) ("*Servette*") (a demand that a secondary employer cease supplying its stores with certain non-Union-made products was lawful because the court found no evidence of Congressional intent "to render such an appeal an unfair labor practice"). The Court found the Act prohibited nothing remotely close to the case at hand. Nor did Congress attempt to bar any other non-picketing conduct.

The LMRDA changed the structure of 8(b)(4) and 303 by more clearly codifying that coercion or restraint was an element of any violation of section 8(b)(4) regardless of the object. In fact, the following colloquy between Senator Kennedy, the Chairman of the Conference Committee, and Secretary of Labor Mitchell demonstrates that Congress intended to allow Unions to request a prohibited object but not allow a threat of a physical work stoppage to enforce the request:

> Senator KENNEDY: Mr. Secretary, I would like to ask you a question regarding section 503(a) of your bill: There is a manufacturer of clothing 'A.' He begins to purchase the products of a plant which is under the domination of racketeers. Would it be a violation of section 503 of your bill if the business agent of the Clothing Workers Union at company A spoke to the plant manager and requested him not to order materials—nonunion materials—from the racketeer plant in Pennsylvania?
>
> Secretary MITCHELL: We don't think it would be, Senator.
>
> Senator KENNEDY: Now, supposing the plant in Pennsylvania was a nonunion plant, would it be a violation under your bill for union leaders in another company to go to his plant manager and ask him not to buy goods from the nonunion plant?
>
> Secretary MITCHELL: Request him not to buy? No.
>
> Senator KENNEDY: Now, if the representative of the Union at plant A told the manufacturer that the members of the Union would not continue to work on goods which were secured from the racketeers shop.
>
> Secretary MITCHELL: In that case, it is my interpretation of our proposal that that would be coercion. And our proposal prohibits coercion for the purpose of bringing pressure on an employer not to buy merchandise from a neutral third party.
>
> Hearings before the Senate Subcommittee on Labor and Public Welfare on S. 505, etc., 86th Cong., 1st Sess., pp. 304-305.

The Congressional Record thus excludes persuasive power from the term coercion even when a Union attempts to secure a secondary objective. The Union can use the economic pressure of a demand but cannot carry it out with a refusal to work on those goods. The line is drawn at the threat of a physical manifestation of force – the threat of a work stoppage. Short of that the Union can use any non-violent means at hand – persuasion, inflatable animals, banners or other action.

c. The Taft-Hartley Act applies the term coercion to employers with different language than it uses to regulate Unions.

Congress applies the term interference to employers and to Unions using different language and therefore a narrower standard under 8(b)(1) and (4) should have no impact on the current interpretation of Section 8(a). The Congressional Record and statutory language of section 8(a)(1) does not require a showing of violence to establish " . . . an unfair labor practice for an employer . . . to interfere with, restrain, or coerce . . . employees . . ." The 1935 Wagner act hearings have extensive references to violence but do not limit employer interference to violence. Section 8(b)(4)(ii) contains substantially different and narrower language. A Union cannot ". . . threaten, coerce or restrain . . ." where it has a secondary object. "Interference" is not in the statutory language of 8(b)(4)(ii). Congress rejected copying 8(a)(1) in 1947 because the language was already too vague and without the focus on violence, the Republicans did not have enough votes. The Board's *National Maritime Union* decision in 1948 confirmed the intent of Congress:

> Section 8 (b) (1) (A) of the Act originated in the Senate. The bill (S. 1126), as originally reported to that body by the Senate Committee on Labor and Public Welfare, did not contain any provision making it an unfair labor practice for a labor organization to restrain or coerce employees. Senators Ball, Taft, Donnell, Jenner, and Smith, in a supplemental statement to the Senate Committee's report on the bill, declared that they would introduce an amendment to this effect on the floor of the Senate. Explaining why they would do so, they said:
>
> > Since this bill establishes the principle of unfair labor practices on the part of unions, we can see no reason whatever why they should not be subject to the same rules as the employers. The committee heard many instances of *union coercion of employees such as that brought about by threats of reprisal against employees and their families in the course of organizing*

> *campaigns; also direct interference by mass picketing and other violence.* Some of these acts are illegal under State law, but we see no reason why they should not also constitute unfair labor practices to be investigated by the National Labor Relations Board, and at least deprive the violators of any protection furnished by the Wagner Act. *We believe that the freedom of the individual workman should be protected from duress by the union as well as from duress by the employer.* [Emphasis supplied.] (*Sen. Rep. No. 105*, 80th Cong., 1st Sess., p. 50.)

On the floor of the Senate, Senator Ball proposed an amendment to the Senate bill, making it an unfair labor practice for a labor organization or its agents "to interfere with, restrain or coerce" employees in the exercise of the rights guaranteed in Section 7. In an accompanying explanation, he said:

> *The purpose of the amendment is simply to provide that where unions, in their organizational campaigns, indulge in practices which, if an employer indulged in them, would be unfair labor practices, such as making threats or false promises or false statements, the union also shall be guilty of unfair labor practices.* [Emphasis supplied.] (*Cong. Rec.*, April 25, 1947, p. 4136.)

The words "to interfere with" were deleted from the amendment with the consent of Senators Ball and Taft, after Senator Ives had expressed the fear that these words "could easily be construed to mean that any conversation, any persuasion, any urging on the part of any person, in an effort to persuade another to join a labor organization, would constitute an unfair labor practice." (*Cong. Rec.*, April 25, 1947, p. 4136.)

National Maritime Union, 78 NLRB supra 983 (emphasis in original). The Republican proponents of the Taft Hartley Act painted the big bad Unions with threatening the mom and pop employers and individual workers with violence. That helped sell the legislations to the public and other members of Congress. But in the process, the proponents had to abandon the phrase "to interfere with" thereby giving Section 8(b)(4) a different much narrower meaning than Section 8(a)(1).

3. <u>The Board should adopt a standard that reflects the congressional record and find that the respondent did not violate the Act</u>

Congress's clear intent in adopting the terms "threaten, coerce, or restrain" was to bar work stoppages, picketing, or physical threats of violence for a secondary object. Republicans wanted to outlaw all secondary pressure of any kind. They did not have the votes in either 1947 or 1959 because the members of the Senate had constitutional and policy concerns. The final

language reflects the requirement that "threaten, coerce or restrain" includes a substantial element of physical intimidation.

In the instant case, respondent's agents sat in lawn chairs for three days next to an inflatable rat and some banners. This behavior comes nowhere near what Congress was trying to prohibit when it adopted section 8(b)(4). The Board should reject the General Counsel's attempt to prohibit all secondary activity and find that "threaten, coerce or restrain" excludes the peaceful protest and persuasion such as the bannering here

B. EXAMPLES OF SEVERAL CASES IN WHICH THE BOARD OR COURTS STRETCHED THE DEFINITION OF COERCION BEYOND THE INTENT ARTICULATED IN THE STATUTORY LANGUAGE AND CONGRESSIONAL RECORD.

Adopting a clear standard that threaten, coerce or restrain must include a physical manifestation of intimidation would eliminate a whole regime of wrongly decided cases where courts or the Board found that a Union engaged in coercion and violated the Act. Ridding the Board and circuit courts of this meritless lure would effectuate the purposes of the Act.

The leading wrongly decided circuit case is *Limbach Co. v. Sheet Metal Workers International Association*, 949 F.2d 1241 (3 Cir. 1991). After a promise of "labor troubles, a grievance and leading a campaign to dissuade workers from working for the secondary employer, the Union in *Limbach* terminated a collective bargaining agreement with the secondary employer. The court found this violated 8(b)(4). The *Limbach* decision concluded: "We hold that the threat of cancelling their bargaining agreement would be a powerful economic weapon in the hands of the unions, which if used for prohibited reasons, constitutes coercion within the meaning of the NLRA." *Id.* at 1249.

Rather than examine if the Union's conduct met the first element of the 8(b)(4) test, the *Limbach* decision skipped over this analysis with the single observation that "[c]oercion can include economic pressure on the neutral party." *Id.* at 1249. From there, the decision focused on the voluntary nature of Section 8(f) agreements and completely ignored whether the conduct was, in fact, coercive. A clear standard requiring that either a 303 plaintiff or a charging party before this Board show picketing, striking, or a threat of violence would have made it clear to the *Limbach* court that pressure, absent violence, does not violate Section 8(b)(4). *See also Taylor*

Milk Co. v. International Board of Teamsters, AFL-CIO, 248 F.3d 239, 245 (3rd Cir. 2001) (identifying as the "*Limbach* Rule" the analytical approach of placing a dispositive weight on the "intention of the parties in coercing neutral parties not to the general rights of parties to take particular actions" or even if the conduct itself was prohibited under Section 8(b)(4)); *Gottfried v. Sheet Metal Workers International Association, Local Union No. 88*, 876 F.2d 1245, 1250 (6th Cir. 1989) (holding that a Union cannot terminate a collective bargaining agreement if the Union has a prohibited object); *Laborers District Council of Minnesota & North Dakota v. NLRB*, 688 F.3d 374 (8th Cir. 2012) (identifying the issue as "whether the Union had an unfettered right to refuse a Section 8(f) contract for a motive the Act declares to be unlawful" and ignoring the first element of the Section 8(b)(4) test).

The D.C. Circuit has similarly interpreted coercion under Section 8(b)(4) too broadly. In *Sheet Metal Workers, Local Union No. 91 v. NLRB*, 905 F.2d 417, 424 (D.C. Cir.1990), the D.C. Circuit considered a Union's withholding of discretionary wage and benefit concessions to an employer who refused to assent to an "Integrity Clause," a proposed collective bargaining agreement provision that would protect against double breasting. Relying on dictum from an older Ninth Circuit case, *Associated General Contractors v. NLRB*, 514 F.2d 433, 438 (9th Cir. 1975) (including within the definition of coercion under Section 8(b)(4) "any form of economic pressure of a compelling or restraining nature"), the D.C. Circuit suggested without explanation that the Union's withholding of these concessions to the employer amounted to coercion because it "unquestionably created economic pressure to sign the Integrity Clause." *Id.* The D.C. Circuit found it irrelevant that the Union had no legal obligation to afford the employer the concessions, concluding that "the otherwise lawful exercise of rights afforded by a collective bargaining agreement can become unlawful when aimed at securing an objective proscribed by section 8(b)(4)." *Id.*

Like *Limbach* and its progeny, the *Sheet Metal Workers'* court erred by largely ignoring the first element of the Section 8(b)(4) test and inappropriately making the Union's objective dispositive. The court was correct that the otherwise lawful exercise of rights can become unlawful when aimed at a prohibited object, but the court failed to mention that this is *only if* the

lawful exercise of rights "threaten[s], coerce[s], or restrain[s]." The Court did not properly consider whether the Union's choice to deny purely discretionary concessions to a contractor did in fact meet this statutory definition, instead relying on the dictum from *Associated General Contractors* to make a conclusory argument and move on to the prohibited object analysis. If the *Sheet Metal Workers* court had fully and properly analyzed whether the Union's withholding of discretionary concessions in that case was coercive, including by considering the legislative history cited in II.A.2., *infra*, the court would have concluded the Union's actions did not violate Section 8(b)(4) because they stopped short of picketing, work stoppages, and other physical manifestations of force and threats.

Adopting the proper definition of coercion would also resolve another problem in coercion cases arising from refusal to sign a collective bargaining agreement. The Board and courts are saying it is a violation of Section 8(b)(4) for a Union to refuse to use its members' own resources in a way that injures the members. If a Union determines that signing a successor agreement with a company is not in the best interest of the Union and its members, the Board simply has no business forcing a Union into maintaining such a collective bargaining arrangement. It is well-established that the Act does not compel parties to reach an agreement and that the Board cannot require one party to agree to any substantive bargaining position. *J&C Towing Company*, 307 NLRB 198 (1992). Yet, continuance of the current coercion standard creates an opportunity for courts and the Board to so require Unions to sign a collective bargaining agreement, where not doing so would have a negative economic effect on the employer.

III. CONCLUSION

There is no basis in the statutory language, or the Congressional Record to find a violation of the Act based on two gentlemen sitting in lawn chairs next to a banner and an inflatable rat for three days. In so doing the Board should adopt a narrow standard that requires for violation of section 8(b)(4)(ii) proof of some manifestation of physical threat, picketing or violence.

Respectfully submitted,

Dated: December 28, 2020

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

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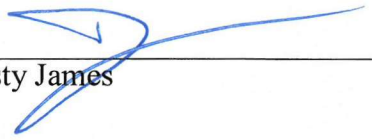
CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within action; my business address is431 I Street, Suite 202, Sacramento, California 95814.

I hereby certify that on December 28, 2020, I electronically filed the forgoing AMICUS BRIEF OF NORTHERN CALIFORNIA CARPENTERS REGIONAL COUNCIL with the NLRB, by using the NLRB's efiling system and served by electronic service, by electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from djames@unioncounsel.net to the email addresses set forth on the attached service list

I certify under penalty of perjury that the above is true and correct. Executed at Sacramento, California, on December 28, 2020.



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